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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ALLAN ROSS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the admission into evidence of transcripts of conversations electronically intercepted in Spain without the production of the recordings themselves was impermissible under Fed. R. Evid. 1004 and violated the defendant's right to due process of law and fundamental fairness as guaranteed by the Fifth Amendment to the United States Constitution.

II. Whether 18 U.S.C. §3505 and the application thereof in this case violated the defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution by authorizing the admission of foreign records of regularly conducted activity through a certificate of the records custodian, thereby denying a criminal defendant the right to confront and cross-examine the custodian of the records or

other qualified witness to which he would be entitled in the case of domestic records under Fed. R. Evid. 803(6).

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OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 33 F.3d 1507 (11th Cir. 1994).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on October 11, 1994. Petitioner's timely request for rehearing was denied on January 20, 1995.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). Because the Petition for Rehearing was denied on January 20, 1995, more than the ninety days provided by Supreme Court Rule 13.1 have elapsed since the denial of petitioner's Petition for Rehearing.[1] The

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[1]With respect to the reasons that this Petition is being filed more than ninety days following the denial of petitioner's petition for rehearing by the Eleventh Circuit Court of Appeals, the undersigned counsel, Kimberly Homan, who is a member of the bar of this Court, makes the following representations to this Court. Ms. Homan

ninety day rule is not jurisdictional and may be waived by this Court. See, e.g., Sanabria v. United States, 437 U.S. 54, 62 n.12 (1978); Durham v. United States, 401 U.S. 481, 481-82 (1971); Schacht v. United States, 398 U.S. 58, 63-65 (1970);

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was the attorney responsible for the preparation and filing of this Petition. Shortly after receiving notice from the Eleventh Circuit that petitioner's petition for rehearing had been denied, she entered the filing deadline for the Petition for Writ of Certiorari in this case in her calendar. However, she erroneously entered the filing deadline on the page in her calendar for May 22, 1995. At the time this error was made, Ms. Homan was in the midst of an acute family crisis involving the hospitalization of her teenaged daughter and, as she has never before missed a filing deadline in her seventeen years in the practice of law, she believes that the calendaring error was likely the product of this crisis. On May 9, 1995, in preparation for the filing of this Petition by or before May 22, 1995, Ms. Homan reviewed the materials required to be included in the appendix to the Petition and discovered the error. She immediately contacted the Clerk's Office for this Court to ascertain the proper procedure to be followed and immediately began finalizing this Petition so that it could be filed as soon as possible after the error was discovered.

Taglianetti v. United States, 394 U.S. 316, 317 n.1 (1969); Heflin v. United States, 358 U.S. 415, 418 (1959).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

> have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. §3505 provides:

§ 3505. Foreign records of regularly conducted activity

(a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that --

> (A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;
> (B) such record was kept in the course of a regularly conducted business activity;
> (C) the business activity made such a record as a regular practice; and
> (D) if such record is not the original, such record is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

(2) A foreign certification under this section shall authenticate such record or duplicate.

(b) At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

(c) As used in this section, the term --

(1) "foreign record of regularly conducted activity" means a memorandum, report, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;
(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country; and
(3) "business" includes business, institution, association, profession, occupation, and calling of every

kind, whether or not conducted for profit.

Fed. R. Evid. 1004 provides:

Rule 1004. Admissibility of other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if --

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by an available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

STATEMENT OF THE CASE

Defendant was charged in a three count superseding indictment with engaging in a continuing criminal enterprise in violation of 21 U.S.C. §848 (Count I), and with conspiracy to import, to distribute, and to possess with intent to distribute marijuana and cocaine (Counts II-III). Following the return of a jury verdict of guilty, as to each of these counts, defendant was sentenced to concurrent terms of life imprisonment on all counts, a ten million dollar fine, and payment of the cost of his confinement.

One month before trial, the government filed an amended response pursuant to Rule 16 of the Federal Rules of Criminal Procedure stating that it intended to introduce transcripts of conversations, in some of which it contended that defendant was a participant, intercepted in Spain by the Spanish National Police, which the

defendant moved in limine to exclude. At trial, following a voir dire hearing, the government was permitted to introduce, over defendant's objection, transcripts of certain conversations as to which no tape recordings were available, the recordings having allegedly been destroyed by the Spanish police. At trial and on appeal, defendant contended that these transcripts were inadmissible under the standards established in United States v. Onori, 535 F.2d 938 (5th Cir. 1976), that they were not admissible under Fed. R. Evid. 1004, and that the admission of these transcripts in the absence of the tapes themselves deprived defendant of any meaningful opportunity to challenge their accuracy and reliability, in violation of defendant's right to due process of law as guaranteed by the Fifth Amendment. The Eleventh Circuit concluded that, because the tapes were not available, Onori was inapplicable,

United States v. Ross, 33 F.3d 1507, 1514 n.9 (11th Cir. 1994), that the transcripts were admissible under Fed.R.Evid. 1004, id. at 1513-14, and that the admission of the tapes did not violate the due process clause, id. at 1514 n.10.

The Marbella Club[2] interceptions, from which the transcripts attributed to defendant were said to be derived, began on January 30, 1988. The conversations in which the defendant was purported to have been a participant were all conducted in English. Joaquin Manich, a former Spanish National Police officer, testified that he prepared the typewritten transcripts which comprise Exhibits 77-78 and 122-124 by listening to the master tape once and then translating the "interesting" conversations into Spanish, without first making an English transcription. Those "important"

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[2] A resort complex in Marbella, Spain.

conversations were then transferred to cassette, upon which the master tape was returned to circulation. As to Exhibits 125-126, Manich listened to the master tape, transferred "the ones he wanted" to cassette, erased the remainder, and then wrote out a Spanish translation in longhand, which he left to be typed by someone else, along with the corresponding cassettes. Before their admission into evidence, these Spanish transcripts of English conversations, prepared by a Spanish police officer, were retranslated into English by a Gainesville, Florida, police officer from Puerto Rico, who had never heard the original tapes.

Manich testified that the cassettes should have been in existence at the time of trial, as standard procedure called for the team leader to either keep the cassettes in his office or to return them to the judge who issued the warrant.

However, Miguel Blanco, the Spanish National Police officer who had transcribed the conversations intercepted over co-conspirator David Sabio's telephone line, testified that the cassettes onto which the "important" conversations are transferred are routinely destroyed after a period of time, unless the authorizing judge had requested a copy, and that, therefore, neither the master tapes nor the cassettes at issue in this case would still exist. Manich further testified that, while he had never seen or spoken with Ross, he could identify Ross' voice because on occasion Ross or someone else had mentioned his name during a conversation -- although this was not the case with respect to any of the transcripts introduced into evidence -- and that he had become familiar with Ross' voice by listening to the tapes.

In response to the government's Notices of Intention to Introduce Into

Evidence Foreign Records of Regularly Conducted Activity, the defendant filed a Motion in Limine seeking exclusion of this evidence. At trial, over defendant's objection, numerous foreign records, including computerized printouts generated in Aruba as a result of a computer search for the names of various individuals, were admitted pursuant to 18 U.S.C. §3505. At trial, and on appeal, defendant contended that §3505, in that it permits the introduction of foreign records with only the certificate of the custodian and dispenses with the requirement that the proponent of the records produce an individual to establish the requisite foundation, subject to cross-examination, violates the Confrontation Clause of the Sixth Amendment. The Eleventh Circuit upheld the constitutionality of the statute, both facially and as applied. United States v. Ross, 33 F.3d at 1515-17.

Through DEA Agent Carl Lilley, the government was permitted to introduce computer printouts of Aruban customs and immigration data, purporting to reflect entries into Aruba by a number of persons, including, most critically, the petitioner and co-conspirators William Blackledge and Angel Sanchez, along with other information such as the hotel at which each intended to stay, the airline on which each had arrived, and the length of their intended stays, Ex. 38. Lilley, who had no personal knowledge of these records, supplied no information regarding their provenance other than that he had travelled to Aruba to obtain the printouts from an Aruban narcotics officer with no connection to Aruban customs or immigration.

REASONS WHY THE WRIT SHOULD BE GRANTED

The issues on which the Writ is sought raise starkly, in two different contexts, several interrelated questions of exceptional importance in any federal criminal prosecution in which the evidence has an international component: May a defendant be deprived of fundamental constitutional rights because of the international origin of the evidence? May carefully developed caselaw and common law principles, arrived at through a careful process of balancing the respective interests at stake, be discarded where the evidence emanates from a foreign jurisdiction whose procedures are less protective than ours of individual rights? In short, does evidence which would be inadmissible under identical circumstances if it were of domestic origin become admissible because protections afforded a defendant from the presentation to the jury

of unreliable evidence are to be jettisoned on the basis of the enhanced difficulties inherent in complying with established law where foreign evidence is concerned? The opinion of the Eleventh Circuit essentially answers these questions in the affirmative. While the circumstances presented in this case are somewhat unusual, the opinion of the Eleventh Circuit has broad, and potentially dangerous, ramifications for the rights of all criminal defendants confronted with evidence of foreign derivation or with what purport to be transcripts of destroyed recordings of intercepted conversations.

ARGUMENT

I. THE OPINION OF THE ELEVENTH CIRCUIT WHICH AFFIRMED THE TRIAL COURT'S DECISION TO ADMIT INTO EVIDENCE TRANSCRIPTS OF THE RECORDINGS OF TELEPHONE CONVERSATIONS ELECTRONICALLY INTERCEPTED IN SPAIN BY THE SPANISH NATIONAL POLICE ALTHOUGH THE TAPES WERE NOT PRODUCED IS INCONSISTENT WITH DEFENDANT'S FIFTH AMENDMENT RIGHTS TO FUNDAMENTAL FAIRNESS AND DUE PROCESS OF LAW AND IS NOT PERMITTED BY FED.R.EVID. 1004

What this Court is asked to review, and what the Eleventh Circuit completely ignores, is the central role which the availability to the defendant of the tape recordings themselves plays in ensuring the defendant a full and fair opportunity to challenge the accuracy of the government's transcripts and the identification of the speaker therein. Both the Eleventh Circuit and other Courts of Appeals have carefully articulated procedures to be followed in submitting transcripts of tape recorded conversations to the jury and have

prescribed an adversarial process for deriving such transcripts and for the presentation of evidence regarding the accuracy or reliability of those transcripts. What all these cases have in common -- and what is absent in this case -- is that the admissibility of transcripts was predicated upon the availability of the recordings themselves to defense counsel, thus enabling the defendant to challenge the accuracy of the transcripts and of the critical voice identifications.[3] Such adversarial testing, which was impossible in this case, is essential to the notions of fundamental fairness and due process which underlie the procedures articulated, for example, in United States v. Onori,

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[3] The petitioner at all times maintained that he was not a participant in these conversations.

supra.[4] Most critically, "[t]he Onori procedure allows the jury to judge the accuracy of the transcript, which is really at issue, rather than the transcriber's credibility in testifying that he made an accurate transcript." United States v. Rochan, 563 F.2d 1246, 1252 (5th Cir. 1977) (emphasis added).

The Onori procedure is fully applicable when the transcripts at issue are English language translations of

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[4]See, e.g., United States v. Stone, 960 F.2d 426, 436 (5th Cir. 1992); United States v. Branch, 970 F.2d 1368, 1371 (4th Cir. 1992); United States v. Hsieh Hui Mei Chen, 754 F.2d 817, 824 (9th Cir.), cert. denied, 471 U.S. 1139 (1985); United States v. Garcia, 854 F.2d 1280, 1283 (11th Cir. 1988), cert. denied sub nom. Lovett v. United States, 489 U.S. 1097 (1989), and sub nom. Cruz v. United States, 494 U.S. 1008 (1990); United States v. Nixon, 918 F.2d 895, 901 (11th Cir. 1990); United States v. Gonzalez-Balderas, 11 F.3d 1218, 1224 (5th Cir.), cert. denied, ___ U.S. ___, 114 S.Ct. 2138 (1994); United States v. Hogan, 986 F.2d 1364, 1376 (11th Cir. 1993).

foreign language tapes. Indeed, the opportunities to challenge the evidence guaranteed by Onori are even more critical in this context, as the issue is not simply whether the written words of the transcript are the same as the words spoken but also whether the foreign language has been accurately translated in terms of context, usage, sense and meaning.

> [The Onori] procedure is well-suited to cases ... where the transcript is an English language translation of a foreign language conversation. Such a procedure does not tie a defendant to an "official" transcript prepared by the prosecution, nor does it "usurp" the fact finder's function. If there is a dispute as to the contents of a foreign language recording, the burden will be on the respective parties to present transcripts or other evidence to support their version of the conversation.

United States v. Llinas, 603 F.2d 506, 509-10 (5th Cir. 1979)(emphasis added), cert. denied, 444 U.S. 1079 (1980). See, e.g., United States v. Cruz, 765 F.2d 1020 (11th

Cir. 1985); United States v. Armijo, 5 F.3d 1229, 1234 (9th Cir. 1993). Without the benefit of the underlying source materials -- the tape recordings themselves -- the transcripts remain largely exempt from the crucible of adversarial testing, the assurance of which lies at the heart of the procedures developed in Onori and other cases.

What is so much a given in previous jurisprudence on the subject is the assumption that such transcripts would not be admissible in a criminal case in the absence of the underlying recordings. The fundamental teaching of these cases is that, absent a full opportunity for adversarial testing, transcripts of conversations should not be submitted to the jury. The extraordinarily anomalous -- and unacceptable in terms of due process and fundamental fairness -- result of the Eleventh Circuit's opinion is that a

criminal defendant is entitled to a full panoply of procedural safeguards when recordings have been preserved but to none if they have not.[5] This is precisely the

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[5] Defendant did not, as the Circuit Court states, have an "ample opportunity to attack the transcripts' credibility." United States v. Ross, 33 F.3d at 114; see also id. at 1525-26 (Black, J., concurring specially). It is abundantly clear from our jurisprudence that such an opportunity, to comport with fundamental fairness, must include at a minimum the opportunity to compare the government's transcripts with the tapes themselves. Moreover, in this case, defendant was not notified until a month prior to trial that the government would seek to introduce the transcripts and only sometime thereafter that the tapes themselves would not be produced. Defendant, therefore, had no opportunity prior to trial to attempt to develop independent material to impeach the accuracy of the transcripts and, most critically, the accuracy of the identification of him as one of the speakers. Defendant requested prior to trial that he be provided with copies of the documents underlying the interceptions, including applications, affidavits, orders, and surveillance logs, which request was reiterated during trial, as the relevant witness indicated on voir dire that the documents could be faxed from Spain. His requests were opposed by the government and denied by the trial court, except as to those documents already in the possession of the government. None were produced.

result of the Eleventh Circuit's holding that, because the tapes were unavailable, the transcripts were admissible under the best evidence rule, Fed. R. Evid. 1004, which holding creates a highly dangerous disincentive to careful preservation of recorded conversations if the government may obtain the admission of transcripts created by it by developing a sufficiently plausible reason to explain the nonavailability of the recordings themselves. The inescapable reality of the transcription process is that one transcriber may genuinely hear one thing while another hears something quite different -- and the potential discrepancies are only magnified by the English to Spanish to English translation process. Even more critically, one person may identify the speaker as "A" while another may be equally sincerely emphatic that the speaker is in fact "B". The best

evidence rule cannot be employed as the Eleventh Circuit did to entirely eviscerate the crucial procedural protections mandated by the Fifth Amendment.

In any event, Rule 1004 is simply inapplicable where, as here, what is sought to be proven is not in fact the contents of a tape recording but rather the existence and content of conversations which may or may not have taken place in Spain, i.e., the occurrence or nonoccurrence of an event and not the contents of a recording.[6] This distinction is exemplified by Wright v. Farmers Co-op, 681 F.2d 549 (8th Cir. 1982), relied upon by the Eleventh Circuit, in which a transcription of a witness statement taken by an insurance adjuster,

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[6] See, e.g., United States v. Howard, 953 F.2d 610, 612 (11th Cir. 1992); United States v. Gonzalez-Benitez, 537 F.2d 1051, 1053 (9th Cir.), cert. denied, 429 U.S. 923 (1976); United States v. Rose, 590 F.2d 232, 237 (7th Cir.), cert. denied, 442 U.S. 929 (1979).

the recording of which had been lost or destroyed, was admitted under Rule 1004 through the testimony of the adjuster, who was fully subject to cross-examination. At issue was the contents of the recorded statement, a considerably different question than that presented here, where the contents of the recording are not the issue. Even so, the Wright court termed the admissibility of the transcribed statement -- in a civil case -- a "close question." Id. at 553. The fairness and due process concerns -- as well as Confrontation Clause protections --which are implicated in criminal cases, unlike civil cases, compel the conclusion that Rule 1004 may not be invoked to deprive a defendant of the protections of fundamental fairness.

Contrary to the Eleventh Circuit's discussion, the facts in United States v. Maxwell, 383 F.2d 437 (2nd Cir. 1967),

cert. denied, 389 U.S. 1057 (1968), are not at all comparable to those presented in this case. Two critical distinctions dispositively differentiate Maxwell from this case, for in Maxwell the defendant did not challenge the accuracy of the transcript and, most importantly, the other participant in the conversation testified to the content of the conversation. Neither Wright nor Maxwell support the admission of the transcripts in this case. Maxwell is the only reported appellate decision, before the opinion in this case, to have ever approved the admission of a transcript of a destroyed recording in a criminal case. Maxwell did not hold the transcript admissible under Rule 1004, as Maxwell predated the adoption of the Federal Rules of Evidence.[7] There is,

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[7] Maxwell was also decided before the enactment of Title III, 18 U.S.C. §2510, et seq., and well before the appellate courts of this country began prescribing

accordingly, no reported appellate decision authorizing the admission in a criminal case of a transcript of a lost or destroyed recording of an intercepted conversation under Rule 1004 except for the Eleventh Circuit opinion in this case.

II. 18 U.S.C. §3505 VIOLATES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT IN THAT IT PERMITS THE INTRODUCTION OF FOREIGN RECORDS ACCOMPANIED ONLY BY A CERTIFICATE OF THE CUSTODIAN AND THEREBY DENIES A CRIMINAL DEFENDANT HIS RIGHT TO CONFRONT AND CROSS-EXAMINE THE RECORDS CUSTODIAN.

The records at issue in this case would not have been admissible had they been domestic records of regularly conducted activity, see, e.g., United States v. McClintock, 748 F.2d 1278, 1292 (9th Cir. 1984), cert. denied, 474 U.S. 822 (1985); United States v. Davis, 571 F.2d 1354, 1358 (5th Cir. 1978); because,

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procedures to govern the admissibility of transcripts.

however, they are said to be records maintained in the regular course of business in a foreign country, 18 U.S.C. §3505 permits their admission without affording defendant the right to confront and cross-examine a "qualified witness" which is mandatory under Fed. R. Evid. 803(6), the cognate provision applicable to domestic records. "[T]he purpose of enshrining [confrontation clause] protection in the Constitution was to ensure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court." Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 3171 (1990) (Scalia, J., dissenting). In enacting §3505, Congress intended to streamline the formerly cumbersome procedures for authentication of foreign documents; however, a goodly portion of that "cumbersomeness" involved

authentication proceedings in foreign countries which the defendant or his counsel had the option of attending if they wished to contest the authenticity or accuracy of the documents at issue, thus safeguarding the defendant's confrontation clause rights. Indeed, two of the cases which have considered the constitutionality of §3505, including Miller, the principal case relied upon by the Eleventh Circuit, predicated their holdings in part upon the defendant's ability to depose the foreign recordkeeper in an effort to expose inaccuracy or inauthenticity. See, e.g., United States v. Miller, 830 F.2d 1073, 1078 (9th Cir. 1987), cert. denied, 485 U.S. 1033 (1988); United States v. Hing Shair Chan, 680 F.Supp. 521, 522-23 (E.D.N.Y. 1980). See also United States v. Davis, 767 F.2d 1025, 1031 (2nd Cir. 1985). In this case, the government did not serve a §3505(b) notice upon defendant until a

month before trial, and as to the Aruban records, not until less than a week before trial. Defendant's request, pursuant to Fed. R. Crim. P. 15(a) and 18 U.S.C. §3507, that he be permitted to take foreign depositions was denied by the district court.

The Miller opinion, upon which the panel placed its primary reliance, dismissed in one sentence the possible efficacy of cross-examination of the records custodian, an analysis entirely at odds with the large body of caselaw which has developed under Rule 803(6) which stresses quite the opposite. Rule 803(6) already represents an accommodation between the interests of efficient presentation of evidence and the defendant's confrontation clause rights, which accommodation may not be further expanded to eradicate the defendant's confrontation clause rights in

the interests of expediency.[8] While the Rule 803(6) exception exempts the proponent from the necessity of producing the preparer of the records, he must nonetheless produce someone familiar with the recordkeeping systems of the entity whose records are sought to be introduced, see, e.g., United States v. Pelullo, 964 F.2d 193, 201 (3rd Cir. 1992), to testify at trial regarding the foundational prerequisites of Rule 803(6), to preserve the defendant's right of confrontation and cross-examination. See, e.g., United States v. Hayes, 861 F.2d 1225, 1230 (10th Cir. 1988); United States v. Norton, 867

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[8] Moreover, the reliance by Miller and by the Eleventh Circuit in this case upon the deterrent value of foreign criminal penalties for perjury, is misplaced -- not only is foreign prosecution for perjury in conjunction with the execution of a §3505 certificate highly unlikely, but also, most critically, a foreign recordkeeper could truthfully attest to all of the §3505 elements even though the records themselves might be inaccurate.

F.2d 1354, 1364 (11th Cir. 1989); United States v. Briscoe, 896 F.2d 1476, 1495 (7th Cir.), cert. denied sub nom. Usman v. United States, 498 U.S. 863 (1990). Rule 803(6) satisfies the requirements of the confrontation clause only "where documents are properly admitted under that section." United States v. Norton, 867 F.2d at 1363.

The live testimony of a qualified witness is, therefore, an essential component of the sufficiency of the guarantees of trustworthiness under Rule 803(6); the Eleventh Circuit, in concluding that a foreign certificate provides an adequate guarantee of trustworthiness to permit the evidence to be admitted without falling afoul of the Sixth Amendment, effectively accords a greater presumption of reliability to foreign records than is afforded domestic documents. Hearsay which does not fall within a firmly rooted hearsay exception -- such as Rule 803(6)

with its express guarantee of a recordkeeper to cross-examine -- is "presumptively unreliable and inadmissible for Confrontation Clause purposes and must be excluded absent particularized guarantees of trustworthiness." United States v. Ross, 33 F.3d at 1516, citing Ohio v. Roberts, 448 U.S. 56, 66 (1980). The Circuit Court noted that such particularized guarantees of trustworthiness "must be such that the evidence is equally reliable as evidence admitted under a firmly rooted hearsay exception to ensure that confrontation through cross-examination would add little to its believability," United States v. Ross, 33 F.3d at 1516 (emphasis added). Foreign documents admitted via the certificate of a foreign recordkeeper not subject to cross-examination can hardly be said to share "equal reliability" with domestic documents admitted through the

live testimony of a qualified witness subject to cross-examination.

The Aruban computer printouts provide a paradigmatic example of why §3505 must be found invalid under the Sixth Amendment. In the context of domestic computer printouts offered pursuant to Rule 803(6), courts have recognized that such evidence demands enhanced scrutiny, with particular emphasis upon the manner in which the data was entered into the computer, how it was stored, maintained, and retrieved, and how the particular printout at issue was generated.[9] An opportunity to rebut the proffered foundation for computer-generated records is an essential prerequisite to

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[9] See, e.g., United States v. Catabran, 836 F.2d 453, 457 (9th Cir. 1988); United States v. Glasser, 773 F.2d 1553, 1559 (11th Cir. 1985); United States v. Sanders, 749 F.2d 195, 198 (5th Cir. 1984); United States v. Scholle, 553 F.2d 1109, 1125 (8th Cir.), cert. denied, 434 U.S. 940 (1977).

their admissibility.[10] Admission of such records under §3505 completely denies criminal defendants the opportunity for such cross-examination which is guaranteed in the context of domestic computer printouts.

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[10] See, e.g., United States v. Hayes, 861 F.2d 1225, 1230 (8th Cir. 1988); United States v. Croft, 750 F.2d 1354, 1365 n.7 (7th Cir. 1984); United States v. Briscoe, 896 F.2d 1476, 1495 (7th Cir. 1990); United States v. Fendley, 522 F.2d 181, 187 (5th Cir. 1975).

CONCLUSION

For all the foregoing reasons, petitioner prays that this Honorable Court grant a Writ of Certiorari to review the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,
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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-2788

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALAN ROSS,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA

Before

EDMONDSON and BLACK, Circuit Judges,

and JOHNSON, Senior Circuit Judge.

JOHNSON, Senior Circuit Judge:

Allan Ross ("Appellant") appeals his convictions arising out of a vast, multi-party, international conspiracy to distribute cocaine. Upon review, we affirm the convictions.

I. STATEMENT OF THE CASE

A. Factual Background

This case concerns an international marijuana and cocaine conspiracy spanning from 1976 to 1990, involving two major international drug organizations, the "West End Gang" headed by Appellant and a Colombian drug organization headed by Angel Sanchez. The West End Gang, headquartered in Montreal, Canada, was led by Dooney Ryan until his murder on November 14, 1984. Shortly after the murder, Appellant, having observed police at the motel where Ryan was staying and, being unaware of Ryan's demise, had his attorney, Sidney Leithman, call the Montreal Police Department to

determine if Ryan and his companion that evening Paul April, had been arrested. April became a suspect in Ryan's murder as Leithman's phone call alerted the police to April's presence with Ryan. On November 25, 1984, April was killed by a bomb in Montreal. Appellant thereafter indicated to two associates, Gaeton Lafond, Jr., and John Quitoni, that he had ordered April's murder in retaliation for the murder of Ryan. Appellant succeeded Ryan as the leader of the West End Gang.

At the time of Ryan's murder, he and Quitoni had been negotiating a cocaine deal, which Appellant subsequently consummated. Through Quitoni and James Allardyce, the West End Gang completed several deliveries of cocaine from South Florida to Canada. In May 1985, at the Marriott Harbor Beach Hotel in Ft. Lauderdale, Florida, Allardyce met with Appellant, Elaine Cohen (Appellant's wife),

David Singer, and Jean Guy Trepanier.[1]

Quitoni testified that within a week after this meeting, Trepanier asked him to come to the Windjammer Resort in Lauderdale-by-the-Sea to supply him a pistol. Quitoni gave the pistol to Trepanier and Raymond DesFosse, who was also present. Early the next morning, in an agitated state, Trepanier called Quitoni and asked him to come to the Windjammer to assist him. There Trepanier and DesFosse told Quitoni that they had killed "the rat," David Singer, on behalf of Appellant because Singer was a potential witness against Appellant on drug and murder charges. They further admitted shooting a police officer the previous night, whereupon Quitoni drove Trepanier and DesFosse to an airport. Appellant later

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[1]Records from the Marriott Hotel showed that Appellant, Cohen, Leithman, and Trepanier stayed there from late April 1985 through early May 1985.

thanked Quitoni for aiding the escape of Trepanier and DesFosse.[2]

Shortly after midnight on May 10, 1985, Trooper Michael Foti of the Florida Highway Patrol stopped a maroon Toyota. As Foti approached the driver's side door, the driver fired a shot, wounding Foti in his right leg. Later that morning, a K-9 officer with the Ft. Lauderdale Police Department tracked two individuals who had fled from a maroon Toyota to the area where a witness had been assaulted shortly after the shooting of Foti. That witness identified Trepanier as the man who aimed a pistol at him while running down the street with another man; the police found the revolver used to kill Singer in the

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[2]Registration records at the Windjammer confirmed Trepanier's stay there from April 27, 1985 through May 8, 1985, and Trepanier's car rental contract for that period indicated that a "Cohen" residing at the Marriott Harbor Beach Hotel had referred him to the rental agency.

maroon Toyota. Singer's body was found the next day, and the medical examiner determined that Singer's death had occurred on May 10. An associate of Singer testified that shortly before Singer's death, he overheard Singer's side of a telephone conversation in which Singer was upset because Leithman was claiming that Singer was a police informant.

Meanwhile, Angel Sanchez ran a large drug operation in Colombia. Although initially the organization only smuggled marijuana into the United States, in late 1981, Angel Sanchez, Pompo Sanchez, William Blackledge, Mark Klein, Robert Lazara, and Robert Moore met to discuss Sanchez's first load of cocaine. Sanchez's organization flew in its first cocaine load in February 1982. Roberto and Raul Aspuru stored the imported cocaine in Florida prior to its distribution.

David Sabio, who was highly involved

in the importations, testified that he arranged a 1986 meeting between Blackledge and Appellant to enable Sanchez to supply cocaine to Appellant. Blackledge thereafter introduced Moore to Appellant. According to Moore, Appellant agreed to make huge, biweekly purchases of cocaine. Roberto Aspuru testified that the Sanchez organization supplied Appellant approximately 300-400 kilograms of cocaine during this time. In 1987, Appellant met with Sanchez to discuss the delivery of a large cocaine shipment to Canada.

In the Spring of 1987, the Sanchez organization recruited Bertram Gordon to arrange a deal with Appellant. Gordon met with Appellant at Blackledge's home several times in 1987, and eventually they agreed that Appellant would import three loads of cocaine from Colombia to Canada, through the United States. The loads, each consisting of approximately 600 kilograms

of cocaine, were flown from Colombia to Appellant's employees in Nashville, Tennessee. In July 1987, Gordon left the United States for Canada, where he served as a middleman in certain of Appellant's drug transactions.

That summer, Angel Sanchez sent two boats to Europe, the "Finesse" containing 146 kilograms of cocaine and the "Big John" containing 600 kilograms of cocaine. Working for Appellant, Trepanier was to off-load the "Finesse" cocaine and distribute it in Europe. Of the "Big John" load, although some was targeted for the Sicilian Mafia, the majority was scheduled for distribution in Spain by Appellant. Appellant sent other employees to assist Trepanier; however, Portuguese and Spanish authorities made arrests and seized the

"Finesse" cocaine.[3]

Contemporaneous with the ships' sailing, the Spanish National Police were observing Appellant's agents, Sabio and Francois LeBoeuf. The Spanish National Police wiretapped various telephones in accordance with Spanish law and observed Trepanier meeting with Appellant at the Malaga, Spain airport in late January 1988. The Spanish police then, again pursuant to Spanish law, wiretapped Appellant's hotel telephone. Transcripts of these various wiretaps were presented at trial, showing incriminating conversations between Sabio, LeBoeuf, Appellant, Blackledge, and Angel Sanchez and his associates. Simultaneously, the Spanish police in Madrid observed meetings between Angel

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[3]After the seizure of the "Finesse" cocaine, Sabio and Gordon fled Spain for Holland, where Gordon was arrested by Dutch law enforcement authorities on February 13, 1989.

Sanchez and members of Appellant's organization, including LeBoeuf and Sabio.

At trial, the government presented evidence of Appellant's attempts to intervene in the police investigation of the drug conspiracy. Specifically, John Flanders, a law clerk to Ft. Lauderdale attorney Kenneth DeLegal, testified that he flew to Montreal in late 1990 to consult with Leithman about the possible representation of Gordon. Although Leithman never told Flanders who was paying for this assistance, Flanders did see Appellant in Leithman's office. At Leithman's request, Flanders flew to Holland in January 1991 to offer Gordon representation, although DeLegal had no prior contact with Gordon. Gordon testified that (1) Flanders claimed to be an attorney retained by "his friends" to represent him, (2) Flanders advised him not to talk to any law enforcement authorities,

and (3) Flanders claimed Appellant would provide him money.

Detective Chris Dale of the Broward County Sheriff's Department arrested Appellant on October 7, 1991 in Ft. Lauderdale. En route to jail, Appellant offered Dale a bribe, stating, as paraphrased by Dale: "Not that I would, but it sure would be nice if I could give you $200,000 or so and you would let me go." Dale ignored the comment.

B. Procedural History

On February 14, 1990, a grand jury sitting in the Northern District of Florida returned a three-count superseding indictment against Appellant, charging him, along with two others in Count I, with engaging in a continuing criminal enterprise, a violation of 21 U.S.C.A. §848 (West Supp. 1994), and, along with fourteen others in Counts II and III, with conspiracy to import, to distribute, and to

possess with intent to distribute marijuana and cocaine, in violation of 21 U.S.C.A. §§ 841, 846, 952 & 963 (West 1981 & 1994 Supp.). Upon the government's pretrial motion, the district court disqualified Appellant's chosen counsel from representing him at trial. The court also denied Appellant's motions to exclude certain government evidence concerning (1) the bombing in Montreal, the murder of Singer, and the shooting of the Florida state trooper, (2) foreign business records, and (3) transcripts of conversations intercepted in Spain by the Spanish National Police. The court granted, over Appellant's objection, the government's motion to empanel an anonymous jury, which was selected on April 7, 1992. The court held a jury trial from April 9, 1992 through May 13, 1992, when the jury returned a verdict of guilty on all three counts. In July 1992, the court sentenced

Appellant to three concurrent life sentences, to pay a fine of ten million dollars, and to pay the cost of confinement and supervision.

Appellant, who is currently incarcerated, filed a timely notice of appeal on August 13, 1992. Appellant raises the following issues on appeal: (1) whether the court erred in admitting into evidence transcripts of tape recordings of telephone conversations intercepted by the Spanish National Police; (2) whether 18 U.S.C.A. §3505 (West 1985) is constitutional; (3) whether the court abused its discretion by limiting Appellant's recross-examination; (4) whether the court abused its discretion by empaneling an anonymous jury; (5) whether the court abused its discretion by disqualifying Appellant's choice of counsel; (6) whether the court abused its discretion by admitting evidence of

Appellant's violent acts; and (7) whether the court erred by refusing to deviate from pattern jury instructions.[4] Upon review, all of Appellant's claims fail.

II. ANALYSIS

A. Admission of Transcripts

When Appellant was in Spain, he met with several of his alleged coconspirators and arranged for the importation and distribution of cocaine. In investigating Appellant, the Spanish National Police installed court-ordered wiretaps on telephones used by Appellant and certain of his coconspirators. Some of the recorded conversations were in English, others in Spanish. The Spanish National Police made transcripts of the recordings, which were then destroyed in the ordinary course of

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[4]Appellant's brief lists twelve issues. For the sake of clarity, our discussion consolidates his claims.

business.[5] Over objection, the district court permitted the government to introduce English-language transcripts of thirteen intercepted and recorded conversations without producing the underlying tape recordings.[6]

Appellant contends that (1) the court

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[5]Only portions of the tape-recorded conversations, those deemed "important" or "interesting," were transcribed.

[6]The transcripts were prepared through a process of transcription, translation, and, in the case of conversations conducted originally in English, re-translation.

The transcripts reflected the following 1988 conversations: (1) January 4, between Sabio and "a Colombian in Madrid," (2) January 5, between Sabio and an unknown person, (3) January 5, between Sabio and Angel Sanchez, (4) January 18, between Sabio and an unknown person, (5) January 20, summary of LeBoeuf conversation, (6) January 23, between LeBoeuf and Iberia Airlines, (7) January 25, between Gordon and unknown persons, (8) January 27, between Blackledge and Sabio, (9) January 30, between Appellant and Trepanier, (10) January 30, between Appellant and Blackledge, (11) January 30, between Appellant and Blackledge, (12) February 3, between Appellant and Blackledge, and (13) February 3, between Appellant and Blackledge.

abused its discretion (a) in admitting the transcripts pursuant to Federal Rule of Evidence 1004 and (b) in admitting them apart from the procedures set out in United States v. Onori, 535 F.2d 938 (5th Cir. 1976) (quorum), and (2) the transcripts' admission violated the Due Process Clause of the Fifth Amendment to the United States Constitution.[7] We review the denial of a motion to suppress as a mixed question of law and fact. United States v. Hooshmand, 931 F.2d 725, 735 (11th Cir. 1991). We review the district court's findings of fact for clear error and the application of the law to those facts de novo. Id. Moreover, the court's determinations of evidence's admissibility are not disturbed absent an abuse of discretion. United States v. Cohen, 888 F.2d 770, 774 (11th

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[7]"No person shall ... be deprived of life, liberty, or property, without due process of law". U.S. Const., amend. V.

Cir. 1989).

The absence of the audiotapes containing the original recorded statements is troublesome. Nonetheless, we differ with Appellant's contention that the court should have excluded the transcriptions of the telephone conversations that occurred in Spain on best evidence grounds. Federal Rule of Evidence 1002 provides that "[t]o prove the content of writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided ... in these rules." The purpose of the best evidence rule is to prevent inaccuracy and fraud when attempting to prove the contents of a writing. FED. R. EVID. 1001 advisory committee's note. However, where the original of a recording has been lost or destroyed, the original is not required and other evidence of its content is admissible, unless the proponent lost or

destroyed the original in bad faith. FED. R. EVID. 1004(1). Once the terms of Rule 1004 are satisfied, the party seeking to prove the contents of the recording - here, the government - may do so by any kind of secondary evidence. See, e.g., United States v. Gerhart, 538 F.2d 807, 809 (8th Cir. 1976); JACK B. WEINSTEIN & MARGARET A. BERGER, 5 WEINSTEIN'S EVIDENCE §1004[01], at 1004-4-1004-5 (1993). Finally, the party against whom the secondary evidence is being offered bears the burden of challenging its admissibility. United States v. Garmany, 762 F.2d 929, 938 (11th Cir. 1985), cert. denied, 474 U.S. 1062, 106 S. Ct. 811, 88 L.Ed. 2d 785 (1986).

Here, all of Rule 1004's requirements are met because the transcripts constituted "other evidence" of "the contents of ... recording[s]" that had been "lost or destroyed" through no fault of the government. See FED. R. EVID. 1004(1).

First, the prosecution was not at fault for the absence of the cassette tapes, which the Spanish National Police destroyed as part of routine procedure.[8] Indeed, the prosecution never had any control of the tapes. Second, the transcripts constituted

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[8]There is some dispute whether all the underlying tapes have in fact been destroyed. Spanish National Police officer Miguel Blanco testified that he prepared the Spanish transcripts that represent conversations intercepted over Sabio's telephone line onto a reel-to-reel tape and copied onto cassette tapes. According to Blanco, the master tape and the cassettes were destroyed pursuant to standard Spanish law enforcement procedure such that neither existed at the time of trial. Spanish National Police Officer Joaquin Manich testified that he prepared the Spanish transcripts that represent conversations intercepted over Appellant's telephone line. He transcribed portions of those conversations, which were transferred from a master reel-to-reel tape to cassettes. Manich testified that he believed the cassette tapes still existed pursuant to standard police procedure. Faced with this conflicting testimony, the court found that the cassette tapes were unavailable to the prosecution. We agree. See Wright v. Farmers Co-op, 681 F.2d 549, 553 (8th Cir. 1982) (resolution of lost or destruction issues is reviewed for abuse of discretion).

admissible best evidence because the transcripts were evidence of the contents of recordings, the misplaced or destroyed audiotapes. The two cases most directly on point - both involving transcripts of conversations recorded on audiotapes - support admission of the transcripts. In a negligence action, the Eighth Circuit held that where an original recording is missing, a transcript may be used to prove the content of the recording. See Wright v. Farmers Co-op, 681 F.2d 549, 553 (8th Cir. 1982). In United States v. Maxwell, 383 F.2d 437 (2d Cir. 1967), cert. denied, 389 U.S. 1043, 88 S.Ct. 786, 19 L.Ed.2d 835 and cert. denied, 389 U.S. 1057, 88 S.Ct. 809, 19 L.Ed.2d 856 (1968), with facts comparable to those of this case, the Second Circuit upheld the use of a transcript as secondary evidence where the recording from which the transcript derived had been accidentally erased and the

drafter of the transcript testified to its accuracy. 383 F.2d at 442-43.[9] Similarly,

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[9]The cases relied upon by Appellant are inapposite. In United States v. Howard, 953 F.2d 610 (11th Cir. 1992) (per curiam), we held that the best evidence rule was inapplicable to testimony concerning the contents of a telephone conversation by the person who had monitored the telephone conversation, when a partially inaudible tape recording of the conversation was also played for the jury. 953 F.2d at 612-13. Conversely, whereas the officer in Howard testified about the content of conversations that he had overheard, here the knowledge of the government's witnesses resulted exclusively from having listened to the recordings, not from personal observations of the conversations. Similarly, in Onori, we held that the trial court need not decide whether the transcript of a tape recording is accurate before that transcript is given to the jury to aid the jury's understanding of the recording, so long as, along with the recording, each party may submit its version of a transcript. 535 F.2d at 948. Onori does not apply to this case because the original recordings are unavailable.

Appellant also maintains, without authority, that, even if the best evidence rule applies, the transcripts should have been excluded as inadmissible hearsay. However, the court did not abuse its discretion by concluding that the statements in the transcripts were made by either Appellant or his alleged coconspirators and thus were admissible as, respectively, admissions or coconspirator statements. See FED. R. EVID. 801(d)(2)(A)

the transcripts here were admitted only after the original recordings could not be located due to standard procedures of the Spanish National Police, and the Spanish police officers who initially transcribed the recordings were cross-examined by Appellant's counsel. Moreover, we note that Appellant had ample opportunity to attack the transcripts' credibility before the jury. See United States v. Howard, 953 F.2d 610, 613 (11th Cir. 1992) (per curiam) (suggesting that availability of monitoring agent at trial furthers purpose of best evidence rule to prevent fraud in proving contents of recordings because defendant may cross-examine agent's abilities and actions).[10] Accordingly, the court

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& (E).

[10]Appellant cites no supporting case law for his claim that the court denied due process by admitting the transcripts. We conclude that this claim is without merit, particularly in light of Appellant's ability to cross-examine the government

properly admitted the transcripts into evidence.

B. Admission of Foreign Records

The government introduced into evidence certain foreign business records, pursuant to 18 U.S.C.A. §3505.[11] Section 3505 allows the admission of foreign records of regularly conducted activity if supported by an affidavit meeting specifically delineated standards.[12]

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witnesses who testified about the contents of the tape.

[11]The records included Aruban immigration records, Spanish and Italian hotel records, and Canadian passport applications, currency exchange records, car registration records, and phone tolls.

[12]The statute provides in pertinent part:

§3505. Foreign records of regularly conducted activity

(a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that -

(A) such record was made, at or

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near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(B) such record was kept in the course of a regularly conducted business activity;

(C) the business activity made such a record as a regular practice; and

(D) if such record is not the original, such record is a duplicate of the original;

unless the course of information or the method or circumstances of preparation indicate lack of trustworthiness.

(2) A foreign certification under this section shall authenticate such record or duplicate.

(c) As used in this section, the term -

(1) "foreign record of regularly conducted activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;

(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country; and

(3) "business" includes business, institution, association, profession, occupation, and calling of every kind,

Appellant contends that section 3505 violates the Confrontation Clause of the Sixth Amendment.[13]

As part of the Comprehensive Crime Control Act of 1984, Congress designed the hearsay portion of section 3505 to track closely the business records exception to hearsay contained in Federal Rule of Evidence 803(6).[14] Subsection 3505(a)(1)

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whether or not conducted for profit.

[13]"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him". U.S. Const., amend. VI.

[14]The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> (6) **Records of regularly conducted activity.** A memorandum, report, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to

"should be interpreted in the same manner as the comparable language in Rule 803(6) is interpreted." H.R. REP. No. 907, 98th Cong., 2d Sess. 3, reprinted in 1984 U.S.C.C.A.N. 3182, 3578, 3581. Congress intended to create "a simple, inexpensive substitute for the cumbersome and expensive procedures" formerly required for the admission of foreign records of regularly conducted activity. H.R. REP. No. 907, 98th Cong., 2d Sess. 3, reprinted in 1984 U.S.C.C.A.N. at 3182, 3580. Because the foreign records were created in foreign

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> make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FED. R. EVID. 803(6).

states where a United States district court's subpoena powers do not extend, see FED.R.CRIM.P. 17(e)(2), the statute establishes that the records' trustworthiness can be shown by an affidavit containing conditions analogous to those set out in Rule 803(6).[15]

The central issue is whether the use of an affidavit to authenticate foreign business records offends the Confrontation Clause. Although this Court has not yet had occasion to address this question, every federal court to consider the issue has held that section 3505 comports with the Confrontation Clause. See United States v. Sturman, 951 F.2d 1466, 1490 (6th Cir. 1991), cert denied, _____ U.S. _____, 112 S. Ct. 2964, 119 L.Ed.2d 586 (1992); United States v. Miller, 830 F.2d 1073, 1077-78 (9th Cir. 1987), cert. denied, 485

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[15]Compare §3505(a) with FED.R.EVID. 803(6).

U.S. 1033, 108 S.Ct. 1592, 99 L.Ed.2d 907 (1988); United States v. Gleave, 786 F.Supp. 258, 276-280 (W.D.N.Y. 1992); United States v. Hing Shair Chan, 680 F.Supp. 521, 522 (E.D.N.Y. 1988). See also Chapman v. State, 331 Md. 448, 628 F.2d 676, 678-86 (1993)(holding that out-of-court statements admitted under state statute permitting use of affidavit to establish status of bank account without requiring bank employees to testify bore sufficient guarantees of trustworthiness to satisfy requirements of federal Confrontation Clause, in part because federal courts have upheld the similar section 3505). We agree with those authorities and conclude that section 3505 is neither per se unconstitutional nor unconstitutionally applied in this case.

The Sixth Amendment right to confrontation is not absolute. United States v. Deeb, 13 F.3d 1532, 1537 (11th

Cir. 1994) (citing United States v. Chapman, 866 F.2d 1326, 1330 (11th Cir. 1989)). See Ohio v. Roberts, 448 U.S. 56, 65-66, 100 S.Ct. 2531, 2538-39, 65 L.Ed.2d 597 (1980)(noting that not all hearsay evidence is incongruous with Sixth Amendment). Even when the introduction of hearsay evidence denies a defendant the opportunity to confront a witness against him, the Confrontation Clause is satisfied if the prosecution establishes that (1) the hearsay declarant is unavailable, id. at 65, 100 S.Ct. at 2538-39,[16] and (2) the hearsay statement bears the "indicia of reliability" necessary to give the jury a sufficient basis for evaluating the verity of the earlier statement. Id. at 65-66, 100 S.Ct. at 2538-39. The Supreme Court

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[16]A witness is considered to be unavailable if, as is the case here, despite the government's good faith efforts, it is unable to procure that witness' attendance at trial. Id., 448 U.S. at 74, 100 S.Ct. at 2543.

has stated "that the 'indicia of reliability' requirement could be met in either of two circumstances: where the hearsay statement 'falls within a firmly rooted hearsay exception,' or where it is supported by 'a showing of particularized guarantees of trustworthiness.'" Idaho v. Wright, 497 U.S. 805, 816, 110 S.Ct. 3139, 3147, 111 L.Ed.2d 638 (1990)(quoting Roberts, 448 U.S. at 66, 100 S.Ct. at 2539). "Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." Id. at 817, 110 S.Ct. at 3147. However, where hearsay exceptions are admitted under an exception that is not firmly-rooted, they are presumptively unreliable and inadmissible for Confrontation Clause

purposes and must be excluded absent particularized guarantees of trustworthiness. Roberts, 448 U.S. at 66, 100 S.Ct. at 2539. These guarantees of trustworthiness must be such that the evidence is equally reliable as evidence admitted under a firmly rooted hearsay exception to ensure that confrontation through cross-examination would add little to its believability. Wright, 497 U.S. at 821, 110 S.Ct. at 3149-50 (citation omitted). See United States v. Strickland, 935 F.2d 822, 831 (7th Cir.)("[Section] 3505 did not change the benchmark question in this and every situation involving the admission of documentary evidence: do the documents bear the indicia of reliability?"), cert. denied, ____ U.S. __, 112 S.Ct. 324, 116 L.Ed.2d 265 (1991), and cert. denied, ___ U.S. ___, 112 S.Ct. 884, 116 L.Ed.2d 787 (1992).

The admission of business records

pursuant to Rule 803(6) is a firmly-rooted exception to the hearsay rule and therefore does not violate the Confrontation Clause. Bourjaily v. United States, 483 U.S. 171, 182-83, 107 S.Ct. 2775, 2782-83, 97 L.Ed. 2d 144 (1987). However, unlike Rule 803(6), section 3505 does not require the caretaker of the business records to appear in court and, thus, section 3505 does not qualify as a "firmly-rooted" hearsay exception. As the Supreme Court has noted, the codification of a hearsay exception does not alone qualify it for a presumption of reliability. See Wright, 497 U.S. at 817-18, 110 S.Ct. at 3147-48. If that were the case, then the Confrontation Clause protections would become increasingly ephemeral as Congress - and the individual legislatures of all fifty states - could effortlessly narrow the scope of the constitutional ban by legislative enactment. Therefore, our inquiry is

whether section 3505 bears sufficient guarantees of trustworthiness to overcome the Sixth Amendment's constitutional hurdle to the admissibility of hearsay.

In concluding that the bank records in question in Miller bore sufficient indicia of reliability, the Ninth Circuit stated:

> The novelty of the statute is to admit the records without confrontation by the defendant with the recordkeepers. No motive is suggested that would lead bank officials to change, distort, or manipulate the records at issue here. The record-keepers have, under criminal penalties in their own countries, asserted that the records are records kept in the ordinary course of business. Examination of the recordkeepers by counsel for [the defendant] could not reasonably be expected to establish anything more or less than that. If the records were in fact inaccurate, it was within [the defendant's] power to depose the recordkeepers and challenge the records.

830 F.2d at 1077-78. This reasoning applies with equal force under the facts of this case. Accordingly, we hold that, as

applied in Appellant's case to admit foreign records kept in the ordinary course of business, section 3505 is constitutional.[17]

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[17]Appellant contends, in the alternative, that the admission of the Aruban immigration records violated both the Confrontation Clause and section 3505 because they consisted of computer print-outs prepared for purposes of litigation. We reject this claim; the court did not abuse its broad discretion in admitting the Aruban records. See §3505(c)(1) (defining foreign records of regularly conducted activity to include "data compilation, in any form"); United States v. Hernandez, 913 F.2d 1506, 1512-13(10th Cir. 1990) (holding that under Rule 803(6), "so long as the original computer data compilation was prepared pursuant to a business duty in accordance with regular business practice, the fact that the hard copy offered as evidence was printed for purposes of litigation does not affect its admissibility."), cert. denied, 499 U.S. 908, 111 S.Ct. 1111, 113 L.Ed.2d 220 (1991).

Appellant further maintains that the court abused its discretion in admitting into evidence certain bank records in Gibraltar pertaining to accounts allegedly used to launder drug monies. These records were introduced through the testimony of a Portuguese police officer who, armed with search warrants, obtained them from the Gibraltar bank. The contested documents served as additional corroboration of testimony of three government witnesses

C. Limitation on Recross-Examination

The district court permitted Appellant to cross-examine all witnesses at great length; however, Appellant claims that the court committed reversible error by imposing an absolute ban on recross-examination,[18] particularly in regards to the denial of recross-examination of government witness David Herrera.[19] The

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that many of Appellant's coconspirators had bank accounts at a particular bank. In light of the overwhelming evidence presented at Appellant's trial, we need not rule whether the admission of these bank records constituted an abuse of discretion, because, at worst, their admission was harmless error. See United States v. Hawkins, 905 F.2d 1489, 1493 (11th Cir. 1990), cert. denied, 498 U.S. 1038, 111 S.Ct. 707, 112 L.Ed.2d 696 (1991).

[18]We note, initially, that the court did allow some redirect examination.

[19]Two Spanish police officers testified that in late January 1988, they observed Appellant, Trepanier, Blackledge, Sabio, LeBoeuf, and Gordon dining together in southern Spain shortly after the arrival of the "Finesse" in Portugal. On redirect examination of Herrera, the government elicited, for the first time, testimony that Herrera had been present along with

defendant must be permitted sufficient cross-examination to allow a jury to adequately assess the witness' credibility; otherwise, any limitation on cross-examination was error. United States v. Lankford, 955 F.2d 1545, 1548 (11th Cir. 1992). Subject to the Sixth Amendment, the trial court has discretion to limit recross-examination. See United States v. Beale, 921 F.2d 1412, 1424 (11th Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 99, 116 L.Ed.2d 71, and cert. denied, ___ U.S. __, 112 S.Ct. 264, 116 L.Ed.2d 217 (1991).

As opposed to cross-examination, a defendant has no constitutional right to recross-examination. United States v. Morris, 485 F.2d 1385, 1387 (5th Cir.

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the Spanish police at the restaurant surveillance and that Herrera had only seen Ross and Trepanier.

1973).[20] A defendant nonetheless does have a limited right to recross-examination where a new matter is brought out on redirect examination. Id. (citing Hale v. United States, 435 F.2d 737, 749-50 (5th Cir. 1970), cert. denied, 402 U.S. 976, 91 S.Ct. 1680, 29 L.Ed. 2d 142 (1971)). Indeed, as the Third Circuit recently held: "When material new matters are brought out on redirect examination, the Confrontation Clause of the Sixth Amendment mandates that the opposing party be given the right of recross-examination on those new matters." United States v. Riggi, 951 F.2d 1368, 1375 (3d Cir. 1991) (emphasis added). Accord United States v. Baker, 10 F.3d 1374, 1404-05 (9th Cir. 1993); United States v. Caudle, 606 F.2d 451, 457-58 (4th Cir.

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[20]In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc), we adopted as precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981.

1979). The Confrontation Clause protects the defendant's "opportunity for effective cross-examination," Delaware v. Fensterer, 474 U.S. 15, 20, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985) (per curiam), and "is the principal means by which the believability of a witness" is tested. Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). In other words, the absence of proper confrontation threatens the ultimate integrity of the fact-finding process. Roberts, 448 U.S. at 64, 100 S.Ct. at 2538. Thus, to allow redirect examination on new material but to deny recross-examination on the same material violates the Confrontation Clause. See Caudle, 606 F.2d at 458 ("Where, as here, new matter is brought out on redirect examination, the defendant's first opportunity to test truthfulness, accuracy, and completeness of that testimony is on recross examination. To deny recross

examination on matter first drawn out on redirect is to deny the defendant the right of any cross-examination as to that new matter.") (citations omitted). We therefore conclude that by denying Appellant an opportunity to recross-examine regarding new material elicited from Herrera on redirect, the court a fortiori abridged the Confrontation Clause.

However, this violation is subject to harmless error analysis. Hawkins, 905 F.2d at 1493. Reversal is not required if, assuming the damaging potential of recross-examination was fully realized, the error was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674 (1986). The factors we consider in determining harmlessness include "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of

evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and ... the overall strength of the prosecution's case." Id. We hold, based on our analysis of these factors, that the error was harmless beyond a reasonable doubt. First, Appellant makes no showing that opportunity for further recross-examination of Herrera would have affected the outcome of the case given the overwhelming degree of evidence favoring the prosecution. In addition, the import of the new evidence brought out on the redirect examination of Herrera was, at best, minimal. Further, although the court denied Appellant the opportunity to recross-examine Herrera, the court in no way prevented Appellant from calling Herrera as his own witness and questioning him directly about his observations in Portugal. See Hale, 435 F.2d at 752 n.22

(prevention of recross-examination "would not have prevented appellant from confronting his accusers; it would only have affected the order of confrontation. All the witnesses were equally available to the appellant and could have been called to the witness stand by him and questioned on direct examination as to any point he desired."). Accordingly, the court's decision to limit Appellant's recross-examination of Herrera was harmless error.[21]

D. Empanelment of Anonymous Jury

Upon the government's motion, the district court selected an anonymous jury for Appellant's trial. The court ordered that the juror's names, addresses, places of employment, and spouses' names and

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[21]From a broad reading of Appellant's briefs, we infer that he also disputes the court's precluding recross-examination of other witnesses. Any such complaint is without merit as Appellant has thereupon shown no prejudice whatsoever.

places of employment not be disclosed during voir dire or at any point thereafter.[22] As a further security measure, the court also ordered that the jurors, who were not sequestered, meet each morning in a central location to which federal marshals would return them at the close of the court day and that they remain in the custody of the marshals throughout the court day. The court's decision to empanel an anonymous jury was premised on its finding that (1) Appellant faced serious charges of dangerous conduct in the context of a large-scale criminal organization, (2) Appellant was able to harm and/or threaten jurors, (3) Appellant

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[22]In the usual case, the parties know the names, addresses, and occupations of potential jurors, as well as those of any spouses, and use this information during voir dire to formulate questions probing for potential biases, prejudices, or any other considerations that might prevent a juror from rendering a fair and impartial decision.

had previously attempted to interfere with the judicial process, and (4) harmful pretrial publicity had occurred. Appellant contends that the empanelment of an anonymous jury violated his right to the presumption of innocence under the Fifth Amendment and his right to trial by an impartial jury under the Sixth Amendment.[23] Moreover, Appellant asserts that the court's cautionary instruction failed to alleviate this allegedly unconstitutional effect. Under the circumstances of this case, we reject Appellant's claims.

Anonymous jury empanelment is an issue of first impression in this Circuit, but our analysis is guided by the methodology developed in other circuits. Every court that has considered the issue has held

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[23]"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed". U.S. Const., amend. VI.

that, when genuinely needed and when properly used, anonymous juries do not infringe a defendant's constitutional rights. See United States v. Paccione, 949 F.2d 1183, 1191-93 (2d Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 3029, 120 L.Ed.2d 900 (1992); United States v. Thomas, 757 F.2d 1359, 1362-65 (2d Cir.), cert. denied, 474 U.S. 819, 106 S.Ct. 66, 67, 88 L.Ed.2d 54 (1985), and cert. denied, 479 U.S. 818, 107 S.Ct. 78, 93 L.Ed.2d 34 (1986). Accord United States v. Crockett, 979 F.2d 1204, 1215-17 (7th Cir. 19992), cert. denied, ___ U.S. ___, 113 S.Ct. 1617, 123 L.Ed.2d 176 (1993); United States v. Scarfo, 850 F.2d 1015, 1021-26 (3d Cir.), cert. denied, 488 U.S. 910, 109 S.Ct. 263, 102 L.Ed.2d 251 (1988).[24] Cf. United

[24]We note that district courts in both the First Circuit and the District of Columbia Circuit have upheld the constitutionality of anonymous juries. See United States v. Pasciuti, 803 F.Supp. 499 (D.N.H. 1992); United States v. Edmond, 730

States v. Varella, 692 F.2d 1352, 1355 (11th Cir. 1982) (upholding government's objections during testimony to disclosure of names, addresses, and occupations of two government witnesses), cert. denied, 463 U.S. 1210, 103 S.Ct. 3542, 77 L.Ed.2d 1392 and cert. denied, 464 U.S. 838, 104 S.Ct. 127, 73 L.Ed.2d 124 (1983). Further, a lower court's decision to empanel an anonymous jury is entitled to deference and is subject to abuse of discretion review. See Paccione, 949 F.2d at 1192. Accord United States v. Thornton, 1 F.3d 149, 154 (3d Cir. 1993); Crockett, 979 F.2d at 1215-16. See United States v. Daniels, 986 F.2d 451, 454 (11th Cir. 1993) (district court has wide discretion in determining which questions will be asked during voir dire).

Unquestionably, the empanelment of an anonymous jury is a drastic measure, one

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F.Supp. 1144 (D.D.C. 1990).

which should be undertaken only in limited and carefully delineated circumstances. An anonymous jury raises the specter that the defendant is a dangerous person from whom the jurors must be protected, thereby implicating the defendant's constitutional right to a presumption of innocence. The presumption of innocence is "undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481 (1895). See Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."). The presumption of innocence does not, however, eliminate from the courtroom every reminder that the State has charged the defendant

with criminal conduct. See Holbrook v. Flynn, 475 U.S. 560, 567, 106 S.Ct. 1340, 1345, 89 L.Ed.2d 525 (1986) (holding that presence of armed, uniformed state troopers in court-room is not infringement on presumption of innocence). Hence, the Second Circuit has articulated, and we adopt, the following principle: "In general, the court should not order the empaneling of an anonymous jury without (a) concluding that there is strong reason to believe the jury needs protection, and (b) taking reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected." Paccione, 949 F.2d at 1192.

Sufficient reason for empaneling an anonymous jury has been found to exist upon a showing of some combination of several factors, including: (1) the defendant's involvement in organized crime, (2) the

defendant's participation in a group with the capacity to harm jurors, (3) the defendant's past attempts to interfere with the judicial process, (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties, and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment. See id. For instance, in Paccione, the Second Circuit affirmed the empanelment of an anonymous jury because the prosecution had reliable reason to believe the defendants had strong ties to organized crime, the defendants were facing lengthy prison sentences and high monetary penalties, witnesses had been killed or threatened, and the case had been, and could be expected to continue to be, the subject of much publicity. Id. at 1192-93. Similarly, the Seventh Circuit determined

that the use of an anonymous jury was justified where the government alleged a pattern of violence by members of the defendants' organization, including the murder of a witness, the defendants had attempted to influence or intimidate witnesses, and there had been extensive pretrial publicity about the case. Crockett, 979 F.2d at 1216. See Scarfo, 850 F.2d at 1023 ("Juror's [sic] fears of retaliation from criminal defendants are not hypothetical; such apprehension has been documented." (collecting cases).

Where jury anonymity is warranted, the defendant's fundamental right to an unbiased jury is sufficiently guaranteed by the court's conduct of a voir dire that can uncover any bias toward issues in the case or to the defendant himself. See Paccione, 949 F.2d at 1192. Additionally, the danger that the jury might infer that the need for anonymity was attributable to the

defendant's character is minimized when the trial court gives the jurors a plausible and nonprejudicial reason for hiding their identities. Id. Thus, for example, in Thomas, the Second Circuit found the court's explanation that jurors were not to reveal their identities to deter unwanted press attention "substantially avoided any risk of aspersions on the defendants." 757 F.2d at 1365. Taking the opposite tact, the trial judge in Scarfo, in instructions upheld by the Third Circuit, informed the jury that they would hear testimony about organized crime and that he wanted them to consider the case without apprehension that they or their families would be endangered. 850 F.2d at 1026-28. The judge further stated that there was no basis for concern and that anonymity was intended to protect the interests of both the government and the defendants to ensure that both sides received a fair trial. Id. at 1027.

The court here did not abuse its discretion in ordering an anonymous jury. First, Appellant, the leader of a large-scale criminal organization, was actively involved in organized crime. Second, that the organization had the means to harm jurors and had in fact committed prior acts of violence. Third, Appellant had previously attempted to interfere with the judicial process by ordering the death of Singer, a potential witness against Appellant. The government had also averred before trial that there had been three separate incidents of violence directed at the relatives of Raul and Roberto Aspuru, potential government witnesses.[25]

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[25]The prosecution specifically alleged that shortly before Appellant's trial, (1) the Aspurus' sister was accosted at her home, beaten, and placed in the trunk of a car with her children; (2) persons falsely identifying themselves as federal agents approached the Aspurus' uncle and two employees, handcuffed them in a padlocked trailer, and ransacked the uncle's property; and (3) unknown persons fired

Appellant also offered bribes to government witness Bertram Gordon and to the officer who arrested Appellant. Finally, Appellant faced the possibility of life sentence and extensive monetary penalties. Consequently, the court correctly found strong reason to empanel an anonymous jury.[26]

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shots into the residence of another Aspuru relative. Even though the government did not prove that these incidents were related to Appellant or another coconspirator, the court nevertheless properly considered them in establishing an anonymous jury. See Crockett, 979 F.2d at 1216 (presence of factor militating in favor of anonymous jury is judged from pretrial perspective of trial court).

[26]The court's finding that the pretrial publicity in this case also warranted an anonymous jury was erroneous. This case received minimal pretrial publicity, including two newspaper stories and one radio report. Nonetheless, the degree of pretrial publicity is not dispositive as to whether to empanel an anonymous jury. See United States v. Melendez, 743 F.Supp. 134 (E.D.N.Y. 1990) (ordering anonymous jury despite specifically finding that case had attracted little publicity), aff'd without op., 999 F.2d 538 (2d Cir. 1993). Rather, in determining whether or not to empanel an

Moreover, the court took reasonable steps to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights were protected. The court explained to the jury that it wanted to insulate them from improper communication from either side and that its decision was no reflection on the defense.[27] Thus, the court's careful

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anonymous jury, courts should look to the totality of the circumstances.

Furthermore, to the extent that the court based its finding on Appellant's dealings with the Sicilian Mafia and the Irish Republican Army, it erred. See United States v. Vario, 943 F.2d 236, 241 (2d Cir. 1991) (holding that mere invocation of names of organized crime groups is insufficient basis to order anonymous jury), cert. denied, ____ U.S. __, 112 S.Ct. 882, 116 L.Ed.2d 786 (1992). We nonetheless affirm the court's decision based on the other grounds discussed in the text.

[27]The court's instruction to the venire was as follows:

> THE COURT: Be seated. Ladies and gentlemen, I would like to make a comment to you concerning the manner in which you are to be selected and the

manner in which you are going to be treated throughout this trial if you are selected as one of the individuals actually sitting on the trial jury.

Now in a case which is expected to attract a high degree of publicity and be a high-profile case, prudence dictates that certain steps be taken to ensure the integrity of the jury, itself. Both sides of this proceeding want to make sure that your verdict is based on the law from which you will be instructed and the evidence developed in the courtroom throughout the course of this trial in the presence of the Court, the defendant, the attorneys, and the jury, without being influenced by any other factors, whatsoever.

Now one of the methods employed to ensure the viability of the jury and to protect the jury members from any unwanted phone calls or contact by the press or by any person concerning this trial, is to not make your name, where you live, or where you or your spouse work, public. This procedure is known as an anonymous jury, which is not altogether an accurate description, but it does emphasize the fact that your name, address, and place of employment for you and your

spouse will not be disclosed to anyone, including the government and the defense attorneys.

Now there must be some exceptions, but they are few. First, the jury clerk has a list of your names for official use, only, such as summoning you to jury duty, checking you in at the beginning of the trial, and issuing your jury paychecks. This list, however, has not and will not be disclosed to any person without and order from this Court.

Secondly, you will be placed under the charge of the United States Marshal, once the jury to try this case has been selected; and if the need arises, your name, et cetera, may be disclosed to the Marshal. However, the Marshal has been instructed not to disclose any personal information about you to any person, including the United States Attorney.

Now in any potentially high-profile case, we are all subject to crank phone calls and anonymous letters and that sort of thing. I want to protect the defendant, as well as the government, from any belief on any part of the jury that any such communications are coming from one side or the other. In other words, I don't want the

defendant to be characterized as someone who would be sending anonymous communications to the jury, and I don't want the government to be characterized as someone who is trying to influence the jury improperly.

Now the use of an anonymous jury is to ensure that both sides will get a fair trial. It's not being done because of any apprehension on the part of this Court that you would have been endangered or subject to improper pressures if your names had been disclosed. Your names have not been disclosed to either side, and that is the way we're going to keep it, just to be sure that there is no suggestion on anybody's part of anything improper from either side.

The fact that you are anonymously selected is not in any way a reflection upon the defendant or the defense or anyone associated with the defense. It is simply a precautionary measure to make sure both sides get a fair trial.

I wish, also to talk to you about what may be interpreted as increased security at the courthouse. Many factors play a part in the Marshal's decision, which has been approved by this

instruction eviscerated any possible inference of Appellant's guilt arising from

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> Court, as to the type of security and the number of personnel who will be working this trial.
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> For instance, the anticipated publicity that may be generated, the number and types of witnesses who may be called, the length of the trial, and the necessity that all public trials in buildings where the Court is housed be conducted in a secure environment.
>
> Now we can all remember the days when such security measures were unheard of, but that is not the world in which we now live.
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> You should not be concerned about your safety or the safety of anyone connected to this trial; and above all, you must not allow these obvious security measures to influence you in your deliberations and verdict; and you must not in any manner allow these security procedures to suggest that you have any fear of the defendant or the government attempting to interfere with you. The security measures are intended to protect the defendant and the government, as well as all others associated with this proceeding.

the use of an anonymous jury.[28] Accordingly, although we do not mean to say that the practice of empaneling an anonymous jury is constitutional in all cases and although we feel that courts should be highly circumspect in ordering the empanelment of anonymous juries, the court did not abuse its discretion by empaneling an anonymous jury in this case.

E. Disqualification of Appellant's Choice of Counsel

Appellant next contends that the district court's disqualification of his counsel of choice violated his Sixth Amendment right to legal representation. At trial, the government called Roberto

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[28]Indeed, Appellant concedes that "the trial judge made an effort to be even-handed in his instructions," and Appellant does not claim that the empaneling of an anonymous jury limited nis ability to conduct voir dire. We nevertheless note that the court conducted a searching voir dire that sufficiently enabled Appellant to examine the venirepersons and to obtain a fair and impartial jury.

Aspuru, who had pled guilty to drug-related charges appertaining to the indictment against Appellant. Prior to and separate from this plea, Roberto Aspuru was represented by Martin Weinberg in a drug-related prosecution in the Western District of Louisiana. In connection with this representation, Roberto Aspuru had met with and paid $40,000 to Joseph Oteri, Weinberg's partner. This representation ended when Roberto Aspuru and the government entered into a plea agreement.

At trial, the law firm of Oteri, Weinberg, and Lawson, the same firm that represented Roberto Aspuru in Louisiana, represented Appellant. James Lawson was the primary attorney for Appellant, assisted by Oteri. The government alleged, and the court agreed, that Roberto Aspuru's previous contacts with Weinberg and Oteri provided grounds for the disqualification of the firm as Appellant's counsel in this

case. A trial court's decision to disqualify the defendant's counsel is reviewed for abuse of discretion. Wheat v. United States, 486 U.S. 153, 163, 164, 108 S.Ct. 1692, 1699-1700, 100 L.Ed.2d 140 (1988).

[28] The Sixth Amendment guarantees criminal defendants that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." More than sixty years ago, the Supreme Court recognized that an essential part of that right is the accused's ability to select the counsel of his choice. See Powell v. Alabama, 287 U.S. 45, 53, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932) ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."). Thus, a criminal defendant has a presumptive right to counsel of choice,

Wheat, 486 U.S. at 164, 108 S.Ct. at 1700, and courts should hesitate to disqualify defense counsel.

Notwithstanding the importance of the right to counsel of choice, that right is not absolute. In determining whether or not to disqualify defense counsel, the court must balance two Sixth Amendment rights: (1) the right to be represented by counsel of choice and (2) the right to a defense conducted by an attorney who is free of conflicts of interest. Id. at 160, 108 S.Ct. at 1697. The need for fair, efficient, and orderly administration of justice overcomes the right to counsel of choice where an attorney has an actual conflict of interest, such as when he has previously represented a person who will be called as a witness against a current client at a criminal trial. See United States v. Casiano, 929 F.2d 1046, 1052 (5th Cir. 1991). When an actual conflict of

interest exists, the client is denied effective assistance of counsel, and the attorney may be disqualified. United States v. Martinez, 630 F.2d 361, 362 (5th Cir.1980), cert. denied, 450 U.S. 922, 101 S.Ct. 1373, 67 L.Ed.2d 351 (1981). Indeed, even a potential conflict suffices for disqualification. Wheat, 486 U.S. at 164, 108 S.Ct. at 1700 ("a showing of serious potential for conflict" overcomes presumption in favor of defendant's counsel of choice). Furthermore, if one attorney in a firm has an actual conflict of interest, we impute that conflict to all the attorneys in the firm, subjecting the entire firm to disqualification. United States v. Kitchin, 592 F.2d 900, 904 (5th Cir.), cert. denied, 444 U.S. 843, 100 S.Ct. 86, 62 L.Ed.2d 56 (1979). See RULES REGULATING THE FLORIDA BAR §§ 4-1.7, 4-1.9 & 4-1.10 (incorporating above-described standards).

In deciding whether the actual or potential conflict warrants disqualification, we examine whether the subject matter of the first representation is substantially related to that of the second. Kitchin, 592 F.2d at 904; see United States v. James, 708 F.2d 40, 46 (2d Cir. 1983). Our goal is to discover whether the defense lawyer has divided loyalties that prevent him from effectively representing the defendant. See United States v. Moscony, 927 F.2d 742, 750 (3d Cir.), cert. denied, 501 U.S. 1211, 111 S.Ct. 2812, 115 L.Ed.2d 984 (1991). If the conflict could cause the defense attorney improperly to use privileged communications in cross-examination, then disqualification is appropriate. Indeed, it is also true that disqualification is equally appropriate if the conflict could deter the defense attorney from intense probing of the witness on cross-examination to protect

privileged communications with the former client or to advance the attorney's own personal interest. In short, the court must protect its independent interest in ensuring that the integrity of the judicial system is preserved and that trials are conducted within ethical standards.

Here, the court properly concluded that Appellant's counsel of choice suffered insurmountable conflict of interest problems. First, the Louisiana case in which Roberto Aspuru was represented by counsel from the disqualified law firm involved a conspiracy to import and distribute narcotics between, among others Roberto Aspuru and certain Colombians, and the government intended to show that Appellant joined this conspiracy to obtain a source for drugs to distribute as part of an ongoing conspiracy centered in Montreal, Canada. Further, at the time the court disqualified Appellant's counsel of choice,

a serious potential for conflict of interest existed. Roberto Aspuru claimed that he gave money to Oteri as a retainer. Testimony about this transaction would have opened the door to potential conflict, as defense counsel could either have tread dangerously close to confidential matters in attempting to explain this transaction, or alternatively, could have improperly avoided related issues.[29] Considering

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[29]Moreover, the government averred that it contemplated presenting proof at trial that an attorney formerly retained by Appellant and accused of obstructing the lawful investigation in this case met with Appellant in the presence of Oteri, raising conflict of interest questions. See Government of Virgin Islands v. Zepp, 748 F.2d 125, 136 (3d Cir. 1984) ("when defense counsel has independent personal information regarding the facts underlying his client's charges, ... he has an actual conflict of interest."). The fact that the government did not elicit testimony from Aspuru that he had paid Oteri money nor testimony about the aforementioned meeting is inconsequential. The decision whether disqualification is proper is judged from the perspective of the trial court at the time of disqualification. Wheat, 486 U.S. at 162-64, 108 S.Ct. at 1698-1700.

these factors, we find that there were actual, and potential, conflicts that could have impeded the trial and undermined the integrity of the judicial system.

Even where an actual conflict exists subjecting the attorney to disqualification, the client may waive this conflict of interest and elect to have the attorney continue representation, so long as that waiver is knowing, intelligent, and voluntary. Martinez, 630 F.2d at 362. In this case, Appellant expressly and unconditionally waived his right to conflict-free representation. Nonetheless, a court need not accept a waiver of the right. Wheat, 486 U.S. at 162, 108 S.Ct. at 1698-99 (holding that trial courts may refuse waivers of conflicts of interest to ensure adequacy of representation, to protect integrity of court, and to preserve trial judge's interest to be free from future attacks over adequacy of waiver and

fairness of trial). Additionally:

> Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them... Not only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation.

Id. at 160, 108 S.Ct. at 1698. As discussed above, the court was confronted with several actual or potential conflicts of interest. If realized, any of the above-discussed conflicts would have rendered the court's verdict suspect and Appellant's assistance of counsel unethical and ineffective. Accordingly, the court did not abuse its discretion by refusing to accept Appellant's waiver of his right to conflict-free representation and by disqualifying Appellant's first choice of

counsel.[30]

F. Admission of Appellant's Acts of Violence

After hearing argument on the admission of testimony regarding (1) the killing of April, (2) the execution-style murder of Singer, and (3) the shooting of a state trooper, the district court denied Appellant's motion to exclude the evidence

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[30]We need not reach the issue whether the erroneous denial of the right to counsel of choice in per se reversible error. See United States v. Urbana, 770 F.Supp. 1552, 1556 n.9 (S.D.Fla. 1991) (collecting circuit court cases that hold that denial of criminal defendant's qualified right to certain counsel of his choice is reversible error regardless whether prejudice is shown). Indeed, the Supreme Court has never held that prejudice is a prerequisite to reversal of a conviction for violation of the Sixth Amendment right to counsel of choice. See, e.g. Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 443, 105 S.Ct. 2757, 2767, 86 L.Ed.2d 340 (1985); id. (Stevens, J., dissenting on other grounds)("[I]n a criminal case an erroneous order disqualifying the lawyer chosen by the defendant should result in virtually automatic reversal."); Flanagan v. United States, 465 U.S. 259, 268-69, 104 S.Ct. 1051, 1056-57, 79 L.Ed.2d 288 (1984).

pursuant to Federal Rule of Evidence 403. We affirm the court's ruling. Relevant evidence may be excluded under Rule 403 only when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. We have repeatedly stated that Rule 403 is an extraordinary remedy that should be used sparingly because it allows the court to exclude admittedly probative evidence. See, e.g., United States v. Chandler, 996 F.2d 1073, 1101 (11th Cir. 1993), cert. denied, _____ U.S. ___, 114 S.Ct. 2724, 129 L.Ed.2d 848 (1994) (No. 93-1033). Thus, we review a court's decision not to exclude evidence pursuant to Rule 403 for an abuse of discretion. United States v. Sanchez, 992 F.2d 1143, 1160 (11th Cir. 1993), cert. denied, ____

U.S. ___, 114 S.Ct. 1051, 127 L.Ed.2d 373 (1994).

In United States v. Dekle, 768 F.2d 1257, 1262-63 (11th Cir. 1985), we upheld the court's admission of evidence of a defendant's uncharged assault on a third person who allegedly conspired to steal marijuana from the defendants. In United States v. Church, 955 F.2d 688, 700 (11th Cir.), cert. denied, ____ U.S. ____, 113 S.Ct. 233, 121 L.Ed.2d 169 (1992), we approved the admission of an uncharged murder to show the motive for a murder conspiracy charged as a RICO predicate act. Similarly, we agree with the court that although Appellant's direction of violent acts was uncharged in the indictment, these acts were intertwined with the drug conspiracy and probative of Appellant's

role in the conspiracy.[31] Further, we find nothing "unfair" in the prejudice that the evidence caused to Appellant. Accordingly, the court did not abuse its discretion by admitting the evidence.[32]

III. CONCLUSION

Appellant's convictions are AFFIRMED.

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[31]The evidence indicated that (1) the bombing murder of April established Appellant as the head of the West End Gang, (2) Singer was murdered at Appellant's direction to silence a police informant, and (3) the state trooper was likely shot incidental to the escape from Singer's murder. All three acts of violence were committed to protect the West End Gang and to advance its drug sales.

[32]Appellant lastly contends that the district court erred by not specially instructing the jury that it had to agree unanimously on the three predicate acts required for a conviction for conducting a continuing criminal enterprise, pursuant to 21 U.S.C.A. §848. Instead of giving the special instruction, the court instead substantially adhered to the relevant Eleventh Circuit Pattern Jury Instruction. This claim is without any merit. See United States v. Lehder-Rivas, 955 F.2d 1510, 1519 n.6 (11th Cir.), cert. denied, __ U.S. ____, 113 S.Ct. 347, 121 L.Ed. 2d 262 (1992).

BLACK, Circuit Judge, specially concurring:

I concur in the panel opinion. I write separately to express my belief that our holding on the admissibility of the wiretap transcripts must be confined to the unique circumstances of this case. The majority opinion should not be read so broadly as to allow virtually automatic admission of purported wiretap transcripts whenever original recordings of a conversation are missing through no bad faith on the part of the Government. That would be an expansive and dangerous precedent. I concur here because of the particular facts of this case and because of the commendable efforts of the district court judge to ensure the reliability of <u>these</u> transcripts.

As the panel opinion notes, the district court admitted transcripts of thirteen telephone conversations

intercepted in Spain by the Spanish National Police. Several of the co-conspirators in this case participated in those conversations, and Appellant Ross was identified a participant in five of the conversations. The district court admitted the transcripts only after satisfying itself that they were an accurate account of actual conversations that had been recorded pursuant to Spanish-court-ordered wiretap. The actual recordings, made in 1988, were not available at the time of trial in 1992.[33]

Before deciding to admit the transcripts as other evidence of the contents of the wiretap recordings under Rule 1004, the district court conducted an evidentiary hearing. That hearing included

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[33]Testimony indicated that no charges were ever brought in Spain as a result of this investigation. It is, therefore, not surprising that the cassette tapes were not available at the time of trial.

testimony from David Sabio, a co-conspirator turned Government witness who participated in five of the chirteen transcribed conversations, none of which were with Ross. The district court also heard from one former and one current Spanish police officer, who had listened to the wiretap recordings and made the original Spanish transcriptions. The Spanish police identified Ross as a participant in his five conversations. Numerous other witnesses tied Ross to the drug conspiracy in other ways.

At the evidentiary hearing, Sabio testified that the transcripts accurately matched his recollection of the five telephone conversations he participated in during his time in Spain in 1988. He specifically recalled that each of the five conversations had occurred, the name of the other participating party, and the general content of each of the conversations.

Further, Sabio testified that the general content was accurately portrayed in the transcripts. On cross-examination by Appellant's counsel, Sabio testified that literal translations of certain unflattering colloquial expressions used by others to address him as a greeting were perfect translations of the words used, rather than interpretations of the meanings of those words. He further verified the accuracy of the transcripts by noting that the unusual nature of the greetings made the conversations memorable for him. Sabio also testified that he could not say the transcripts contained the exact words used by the parties in every conversation, but that he believed the conversations were carried on essentially as transcribed.

The two Spanish police officers told the district court how they made all thirteen original transcripts. They testified that all phone conversations from

two wiretapped phones were originally recorded on a master tape. A Spanish police officer then listened to the master tape and identified conversations that related to their ongoing investigation. The recordings of those conversations were duplicated onto cassette tapes and the master tape was then reused. Generally, the Spanish police made a Spanish language transcript of the conversations while listening to the duplicate cassette, but on certain occasions the transcript was made directly from the master tape. The district court noted that the procedures followed fell short of the safeguards provided in this country by 18 U.S.C. §2516, but comported with Spanish law.

Defense counsel had ample opportunity to cross-examine the Spanish police officers in front of the jury on the procedures that they followed in making the transcripts and the accuracy of their

identification of the participants. Sabio was also available to the defense for testimony regarding the accuracy of the transcripts but, not surprisingly, he was not called, presumably because his testimony supports the accuracy of the transcripts. Interestingly, the Government did not bolster the reliability of the transcripts for the jury by re-calling Sabio as a witness after the transcripts had been ruled admissible. Sabio had been called as a Government witness prior to the proffer of the transcripts, and naturally his testimony at that time made no mention of the transcripts. Thus, the jury weighed the value of the transcripts without the benefit of Sabio's testimony supporting their accuracy.

It is important to note that the United States government played no role whatsoever in either the preparation or destruction of the master recordings or the

cassette tapes. There is no question that these transcripts meet Rule 1004's requirement that the original recording not be lost through bad faith on the part of the proponent. Fed.R.Evid.1004(1). There is also no question that, given Sabio's testimony, admission of the five transcripts is troublesome. I am, however, satisfied that the evidentiary hearing demonstrated that the transcripts were indeed reliable. Under the circumstances, involving the actions of a foreign government and not the United States government, I agree that they were properly admitted. I reiterate, however, that our holding on this issue should be confined to unique circumstances presented in this case.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-2788

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALAN ROSS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATE DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: EDMONDSON and BLACK, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court have requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

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UNITED STATES CIRCUIT JUDGE
Date Filed: January 20, 1995